Supreme Court, U.S.
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No. 91-1574

In The

Supreme Court of the United States

October Term, 1991

JOYCE PERKINS,

Petitioner,

vs.

WESTERN SURETY COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit interfered with the jurisdiction of the Mississippi Supreme Court when it affirmed the decision of the United States District Court for the Southern District of Mississippi against Joyce Perkins and in favor of Western Surety Company.

2. Whether the Court of Appeals properly applied Mississippi law when affirming the District Court's judgment in favor of Western Surety Company.

PARTIES TO THE PROCEEDING BELOW

The parties in the Court below were:

Appellant: Joyce Perkins

Appellee: Western Surety Company, a South Dakota Corporation with its principal place of business in Sioux Falls, South Dakota. The parent corporation of Western Surety Company is Surewest Financial Corporation. Western Surety has no non-wholly owned subsidiaries.

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BRIEF IN OPPOSITION

OPINIONS BELOW, JURISDICTION, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Opinions Below, Jurisdiction and Statutory and Regulatory Provisions involved are correctly set forth in the Petition.

STATEMENT OF THE CASE

On August 6, 1985, the Chancery Court of Warren County, Mississippi, appointed Joyce Perkins as administratrix of the Estate of Robert Taylor, Deceased, and required a $200,000.00 administratrix bond. On that same

date, Joyce Perkins as principal entered into an application for bond with Western Surety in the penal sum of $200,000.00. Contained within the bond application was an indemnity agreement which expressly states as follows:

> The undersigned hereby certify the truth of all statements in the application, and jointly and severally agree:
>
> * * *
>
> (ii) to completely indemnify the Company (Western Surety) from and against any liability, loss, costs, attorneys fees and expenses whatsoever which the Company shall at any time sustain as surety or by reason of having been surety on this bond or any other bond issued for applicant or for the enforcement of this agreement.

On September 10, 1986, a relative of the deceased was allowed to intervene and to file a Complaint against Joyce Perkins, individually and as administratrix under the bond, as well as Western Surety as the administratrix's surety. On the same day, Western Surety filed a cross-claim against Joyce Perkins individually seeking reimbursement for attorney's fees and expenses incurred in its defense of its interest as surety under the administratrix bond.

On November 12, 1987, the Chancery Court of Warren County, Mississippi, awarded Western Surety a judgment against Joyce Perkins in the amount of $39,155.65 for reasonable and necessary attorney's fees and expenses which it incurred and paid through September 30, 1987.

On October 28, 1987, Joyce Perkins appealed the Warren County judgment to the Mississippi Supreme Court. This appeal was made prior to the entry of final judgment. On November 5, 1987, Joyce Perkins filed a Petition for Stay on the Collection Proceedings pursuant to the judgment entered in favor of Western Surety. On November 12, 1987, the final judgment was entered in favor of Western Surety; and additionally, supersedeas bond was set at $125,000.00. Joyce Perkins filed an Emergency Motion to Review the bond; however, the Mississippi Supreme Court affirmed the amount of the bond on December 10, 1987.

Joyce Perkins procured and attempted to submit an appeal bond which failed to meet the statutory requirements. Therefore, Western Surety began collection proceedings by filing a Suggestion for Writ of Garnishment on December 21, 1987.

On December 22, 1987, Joyce Perkins filed an Emergency Motion to Quash the Writ of Garnishment which the Mississippi Supreme Court, by Order dated December 23, 1987, remanded to the Warren County Chancery Court for determination. Shortly thereafter, Joyce Perkins filed a Motion for Leave to Amend the Bond and Western Surety filed a Motion to Quash the Purported Bond. After a hearing on January 5, 1988, the Warren County Chancery Court entered its order denying the Motion to Amend and granting Western Surety's Motion to Quash the Purported Bond.

Next, on January 12, 1988, Joyce Perkins returned to the Mississippi Supreme Court and filed an Emergency Petition to Quash Writs of Garnishment and Attachments,

to Dismiss Civil Suit and Other Relief. On January 20, 1988 the Supreme Court denied the emergency relief sought by Joyce Perkins. On that very same day, Joyce Perkins filed suit in the United States District Court for the Southern District of Mississippi seeking extraordinary relief in the from of a temporary restraining order to stop the garnishment and to grant her relief from having to post the $125,000 bond. This request for relief was also denied.

On January 26, 1988, Joyce Perkins filed another appeal bond in yet another attempt to satisfy the statute and court order. On January 29, 1988, Joyce Perkins filed a Petition with the Mississippi Supreme Court for Re-Hearing on the Emergency Motion to Quash Writs of Garnishment, Dismiss Civil Suit and Other Relief. On February 25, 1988, the Supreme Court again remanded the issue to the Warren County Chancery Court for further hearing on the bond. On March 8, 1988, the Warren County Chancery Court entered an order which found that the second bond filed by Joyce Perkins was also invalid. Thereafter, on or about March 17, 1988, Joyce Perkins filed a Petition for Re-Hearing in the Chancery Court of Warren County, Mississippi. On May 6, 1988, the Warren County Chancery Court entered an order denying the Petition for Re-Hearing. On May 13, 1988, Joyce Perkins filed her Notice of Appeal of the Chancery Court Order to the Mississippi Supreme Court.

In the meantime, on August 2, 1988, the Warren County Chancery Court entered an order closing the Estate of Robert Taylor, Deceased and approving the distribution of assets. Immediately thereafter, on August 4, 1988, Joyce Perkins filed a Supplemental Notice of

Appeal of Separate Order Taken Under Advisement To Close Estate While Contested Supersedeas Bond is on Appeal. On August 8, 1988, Joyce Perkins filed another Emergency Motion to Grant Stay of Execution Pending the Review of the Contested Supersedeas Bond. On August 10, 1988, the Mississippi Supreme Court entered an order agreeing to have an expedited hearing on the bond and staying the order allowing the estate assets to be distributed. On October 14, 1988, the Supreme Court issued an order to the Warren County Chancery Court staying the distribution of the estate's assets until December 15, 1988. On December 21, 1988, the Supreme Court of Mississippi entered a further stay until January 16, 1989 which was further extended to February 15, 1989.

On March 8, 1989, the Mississippi Supreme Court once again remanded for further hearing the consideration on the bond to the Warren County Chancery Court. On March 23, 1989, the Warren County Chancellor, rather than lowering the previously established $125,000 bond, raised the bond to the amount of $126,260.68.

On April 12, 1989, Joyce Perkins filed an Amended Appeal Bond to the Supreme Court. On April 26, 1989, the Warren County Chancery Court again reviewed the Amended Appeal Bond and determined that it was insufficient and did not constitute a valid and sufficient supersedeas bond. Immediately thereafter, on April 26, Joyce Perkins filed a Petition for Writ of Mandamus. Additionally, on April 28, 1989, Joyce Perkins filed in the Chancery Court of Warren County, Mississippi a Motion for a Stay Pending the Review of the Contested Supersedeas Bond. On that same day, the Chancery Court of

Warren County, Mississippi denied Joyce Perkins' request for a further stay.

On May 31, 1989, Joyce Perkins filed a Petition for Re-Hearing on Petition for Writ of Mandamus and Stay Under Rule 8(d), which was dismissed as moot on August 8, 1989, because, on that same day, the Mississippi Supreme Court rendered its opinion on the original appeal from the Warren County Chancery Court. The Supreme Court held that the trial court made a mistake in interpreting the statutes regarding whether Joyce Perkins was entitled to inherit from the Estate of Robert Taylor, and remanded the case to the chancellor to apply the correct law. The Supreme Court also remanded the issue of whether Western Surety acted in good faith in hiring its own counsel, and whether the attorneys' fees were reasonable and necessary under the circumstances. On February 27, 1990, by order of the Warren County Chancery Court, the court, after applying the correct statutes, again entered a judgment finding that Joyce Perkins was not entitled to inherit from the Estate of Mr. Robert Taylor, and more importantly, further found that it was necessary for Western Surety to hire separate counsel, and that Western Surety acted reasonably and in good faith in employing separate counsel, and again awarded attorneys' fees to Western Surety, this time in the amount of $35,000.

Next, on March 6, 1990, Joyce Perkins filed a Petition for Re-Hearing in the Chancery Court for reconsideration of its February 27th order. On April 4, 1990, the Chancellor denied the petition. Immediately thereafter, on April 11, 1990, Joyce Perkins filed her Notice of Appeal of the Chancellor's April 4th Order. On May 15, 1990, Joyce

Perkins filed an Appeal Bond with the Mississippi Supreme Court with Supersedeas in the amount of $94,000 for the appeal. This appeal, regarding the second Warren County Chancery Court order is now pending before the Mississippi Supreme Court.

On April 5, 1988, Western Surety filed the case *sub judice* in Federal District Court seeking reimbursement for its attorneys' fees incurred *after* October 1, 1987. Due to the numerous pleadings and cases filed by Joyce Perkins after the initial Complaint was filed, the amount of fees had to be amended. The attorneys' fees requested by Western Surety in the action filed in the United States District Court for the Southern District of Mississippi were incurred during the time frames of October 1, 1987, through August 28, 1990. These fees are neither duplicative or interrelated to the fees requested in the case currently pending in the Mississippi Supreme Court.

On December 20, 1990, the United States District Court for the Southern District of Mississippi awarded Western Surety $75,432.47 in attorneys' fees. Petition, Appendix, p. 16. In affirming the District Court, the Court of Appeals correctly found that the District Court did not interfere with the jurisdiction of the Mississippi Supreme Court. Petition, Appendix, pp. 18-20.

Petitioner has represented to this Court that the decisions of both the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit directly conflict with a decision of the Mississippi Supreme Court. Moreover, Petitioner asserts that the Court of Appeals interfered with the jurisdiction of the Mississippi Supreme

Court. No conflict or usurpation of power exists since the subject matter of the federal court litigation was separate and distinct from the subject matter of the case pending in the Mississippi Supreme Court. The issue of attorneys' fees incurred from October 1, 1987 until August 28, 1990, has never been presented to the Mississippi Supreme Court. In addition, the Court of Appeals properly applied Mississippi law regarding the necessity and reasonableness of the attorneys' fees.

ARGUMENT

This case does not present any federal or state constitutional or statutory questions nor does it present any question upon which there is a conflict in the Courts of Appeals or the District Courts. In addition, this case does not present an important issue of federal law nor does it present a conflict between a decision of the Court of Appeals and the Mississippi Supreme Court regarding a general, non-federal matter.

Petitioner asserts that she is entitled to invoke the jurisdiction of the United States Supreme Court because of a conflict between the Court of Appeals ruling and a decision of the Mississippi Supreme Court. Petitioner's assertion is simply incorrect, because no conflict exists. The case currently before the Mississippi Supreme Court involves a different subject matter from the case before the District Court and the Court of Appeals because the federal case dealt with separate and distinct attorneys' fees incurred in a wholly different time frame than the state court case. As such, there should be no dispute that

the District Court had both subject matter and personal jurisdiction over the parties before it. In any event, it is well established that two concurrent *in personam* actions existing between the same parties and dealing with the same subject matter may proceed concurrently in both the state forum and the federal forum. *Moses H. Cone Memorial Hospital v. Mercury Constr.*, 460 U.S. 1 (1983). In its Opinion affirming the ruling of the District Court, the Court of Appeals recognized that a similar case was pending in the Mississippi Supreme Court, and ruled that the District Court did not interfere with the jurisdiction of the Mississippi Supreme Court. Petition, Appendix, pp. 18-20.

Petitioner also attempts to assert that the decision of the Court of Appeals conflicts with federal court decisions regarding forum shopping. This assertion ignores the clear law in Mississippi that the pendency of a state court action does not preclude the federal court from considering the same matter. *Rippy v. Crescent City Commodities*, 710 F. Supp. 1074, 1080 (S.D. Miss. 1988). In addition, where both personal and subject matter jurisdiction exists, federal courts are obliged to hear cases properly within their jurisdiction even though there may be a pending state court case. *Evanston Insurance Co. v. Jimco, Inc.*, 844 F.2d 1185, 1191 (5th Cir. 1988).

In the case *sub judice*, two separate lawsuits were filed, each admittedly seeking attorney's fees pursuant to the same Indemnity Agreement. However, as previously mentioned, the time frame for which the fees are sought and the services rendered in order to produce the fees are totally separate and independent. Pursuant to 28 U.S.C. § 1332, the District Court properly invoked diversity

jurisdiction over the federal court lawsuit as both the Plaintiff and Defendant were citizens from different states and the matter in controversy exceeded $10,000.00.[1] Petition, Appendix, p. 18. As such, the Petitioner's claim that the present case in federal court interfered with the jurisdiction of the state court lawsuit is incorrect and must fail.

In addition, the Court of Appeals determined that the award of attorney's fees in this case was not dependent on a ruling in the case pending before the Mississippi Supreme Court. Petition, Appendix, pp. 18-19. Moreover, an independent determination of the reasonableness and necessity of the attorneys' fees awarded was made by the District Court in accordance with Mississippi law, and affirmed by the Court of Appeals. Petition, Appendix, pp. 19-20. There has been no misapplication of or refusal to follow, a state court decision. It has long been settled that situations such as this are not appropriate for review on certiorari by this Court. *Huddleston v. Dwyer*, 322 U.S. 332, 337 (1944); *Francis v. Southern Pacific Co.*, 333 U.S. 445, 447 (1948); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674 (1949).

Petitioner finally asserts that this case is of great public importance "because it will cause surety companies to be viewed in a different manner if the court will uphold the duplication of services by the surety company that insists on having its attorneys sit throughout the contest of an estate and bill its fees to the principal."

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[1] The Complaint in this matter was filed prior to the amendment of 28 U.S.C. § 1332 requiring the matter in controversy to exceed $50,000.00.

Petition, p. 8. Respondent strongly disagrees with this statement and further submits that there is no issue of importance to the public as a whole presented in this case.

However, it must be pointed out that the majority of the attorneys' fees awarded by the District Court and Court of Appeals were created by the numerous pleadings, motions and petitions filed by the Petitioner. Therefore, a more accurate statement of the issue would be that a surety who is required to defend excessive, and in many instances duplicative pleadings filed by a principal on a bond, should expect to receive, and should receive, indemnification from that principal as clearly set forth in the parties' contract. Any other ruling would result in the cost of bonds skyrocketing.

Because this case presents no issue of significant public importance, certiorari should not be granted. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955).

CONCLUSION

This case does not present a federal or state constitutional or statutory question nor does it present a question on which there is a conflict in the Court of Appeals or the District Courts. Moreover, there exists no important question of federal law which this Court should now settle. In addition, this case does not present a conflict between a decision of the Court of Appeals and of the Mississippi

Supreme Court on a general, non-federal matter. Respondent respectfully submits that the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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